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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 KING K. GARDNER,

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE, Commissioner of  
14 Social Security,

15 Defendant.

Case No. C04-5545 FDB

ORDER FOR ATTORNEY FEES  
PURSUANT TO 42 U.S.C. § 406(b)

16 This matter comes before the Court on Plaintiff's motion for authorization of attorney fees  
17 under 42 U.S.C. § 406(b). Counsel for Plaintiff seeks a gross fee award of \$32,504, and a net award  
18 of \$16,629.35. The Commissioner has filed a response to Plaintiff's motion requesting that  
19 Plaintiff's request be partially rejected and the amount reduced.

20 **42 U.S.C. § 406(b)**

21 Attorney's fees may be awarded to a successful social security claimant's lawyer for his or  
22 her representation before a court pursuant 42 U.S.C. §§ 406(b); Straw v. Bowen, 866 F.2d 1167 (9<sup>th</sup>  
23 Cir. 1989). Plaintiff must apply to the Social Security Administration for an award of fees for  
24 representation at the administrative level. 42 U.S.C. § 406(a); Stenswick v. Bowen, 815 F.2d 519  
25 (9<sup>th</sup> Cir. 1987). Previously, this Court awarded Plaintiff's counsel the amounts of \$5,067.50 and

1 \$5,447.15 pursuant to the Equal Access to Justice Act (EAJA). The net award of § 406(b) fees that  
2 Plaintiff's attorney seeks, \$16,629.35 is the balance remaining after the amount withheld, 25% of  
3 the of past-due benefits award of \$130,504, is reduced by the EAJA fees and \$5,300.00 already paid  
4 as attorney fees in the administrative proceeding..

5 Under 42 U.S.C. § 406(b)(1)(A) the court can only award fees up to the 25 percent withheld  
6 from the past-due benefits. This 25 percent limit applies to the total of EAJA and § 406(b) fees  
7 combined. See, Morris v. Social Sec. Admin., 689 F.2d 495, 497-98 (4<sup>th</sup> Cir. 1982); Webb v.  
8 Richardson, 472 F.2d 529, 536 (6<sup>th</sup> Cir. 1972); Dawson v. Finch, 425 F.2d 1192, 1195 (5<sup>th</sup> Cir.  
9 1970). The regulations define "past-due benefits" to mean:

10 the total amount of benefits payable under title II of the Act to all beneficiaries  
11 that has accumulated because of a favorable administrative or judicial  
12 determination or decision, **up to but not including the month the**  
13 **determination or decision is made.**

14 20 C.F.R. § 404.1703 (2008) (emphasis added). As detailed by the Commissioner, the favorable  
15 decision that resulted in past-due benefits was issued by an Administrative Law Judge on  
16 September 26, 2008. Therefore, past-due benefits for purposes of calculating attorney fees under 42  
17 U.S.C. § 406(b) ended in August 2008. Monthly benefits payable in September 2008 were  
18 \$1,900.10. Accordingly, past-due benefits subject to attorney fees are thus \$128,115.90

19 Twenty-five percent of past due benefits is \$32,028.98. Applying the deductions proposed  
20 by Plaintiff, and not objected to by the Commissioner, Plaintiff is entitled to a net fee under §  
21 406(b) of \$16,154.33.

### 22 **Conclusion**


23 The Court concludes that an attorney's fees award of \$32,028.98 is reasonable within the  
24 meaning of § 406(b). Subtracting the previously awarded EAJA fees and other attorney fees  
25 previously paid, counsel is entitled to a net award of \$16,154.33.

1           ACCORDINGLY;

2           IT IS ORDERED:

3           Plaintiff's Motion for an Award of Attorney's Fees [Dkt #34] is **GRANTED**. Plaintiff's  
4 counsel is awarded 42 U.S.C. § 406(b) gross attorney fees in the sum of \$32,028.98. The  
5 Commissioner is directed to subtract the previously awarded EAJA fees and other attorney fees paid  
6 counsel and send to Plaintiff's counsel an award of \$16,154.33., minus any applicable processing  
7 fees as allowed by statute.

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9           DATED this 20<sup>th</sup> day of July, 2009.

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FRANKLIN D. BURGESS  
UNITED STATES DISTRICT JUDGE